

STATE OF MICHIGAN  
COURT OF APPEALS

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DARRYL HALL,

Plaintiff-Appellant,

v

DETROIT FORMING INC,

Defendant-Appellee.

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UNPUBLISHED

January 8, 2008

No. 274059

Oakland Circuit Court

LC No. 2005-070760-CL

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

ZAHRA, J. (*dissenting*).

I respectfully dissent. I conclude plaintiff may not introduce evidence of hostile work environment acts that took place more than three years from the date the complaint was filed to establish his claim. I also conclude there is insufficient evidence to support plaintiff's claims of a hostile workplace environment and failure to promote. As more fully explained below, I would affirm the judgment of the trial court.

I Hostile Work Environment

In *Garg v Macomb Community Mental Health Services*, 472 Mich 263, 290; 696 NW2d 646 (2005), our Supreme Court abolished the "continuing violations" method for interpreting a statute of limitations. Instead, our Supreme Court held that the plain language of MCL 600.5805 controls statute of limitations inquiries. MCL 600.5805(1) states that "[a] person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section." MCL 600.5805(10) states that "[t]he period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property. Thus, plaintiff cannot bring an action to recover damages "unless, after the claim first accrued to the plaintiff . . . the action is commenced" in 3 years.

I conclude that evidence of a purported hostile work environment that happened beyond the 3-year statute of limitations period cannot establish a hostile work environment claim. In *Garg, supra*, our Supreme Court stated that "[a]n employee is not permitted to bring a lawsuit for employment acts that accrue outside the limitations period." *Garg, supra* at 284. Several panels of this Court have held that acts of hostile work environment that happened beyond the limitations period cannot establish a hostile work environment claim. See *Ramaathan v Wayne*

*State Univ Bd of Directors*, unpublished opinion per curiam of the Court of Appeal, issued January 4, 2007 (Docket No. 266238), slip op at 1; *Hill v PBG Michigan, LLC*, unpublished opinion per curiam of the Court of Appeals, issued October 10, 2006 (Docket No. 268692), slip op at 3; *Russell v PBG Michigan LLC*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 2006 (Docket No. 263903), slip op at 1-2; *Shepherd v General Motors*, unpublished opinion per curiam of the Court of Appeals, issued July 26, 2005 (Docket No. 260171), slip op at 2. Therefore, plaintiff can only establish his claim through purported acts of hostility in the workplace that allegedly happened after November 8, 2002.

For this reason, I disagree with the majority opinion's conclusion that the alleged comment by Leigh Rodney, defendant's president, relating to employees going back to pick cotton in the field can be considered to establish plaintiff's hostile workplace claim. Significantly, plaintiff failed to show that the above statement was made within the limitations period. Plaintiff testified at his deposition, that:

*Defense counsel:* Do you know when the [first] statement was made?

*Plaintiff:* It had to happen in like 2002 or 2003.

Later, plaintiff counsel asked plaintiff:

*Plaintiff counsel:* And I am sorry, what year did you say this happened?

*Plaintiff:* 2002 or 2003, I don't know.

*Plaintiff counsel:* You don't which year?

*Plaintiff:* Right. I just know it was said.

Plaintiff has not provided sufficient evidence that Rodney made the statement after November 8, 2002. In addition, defendant submitted evidence that Rodney only attended a May/June 2002 shift meeting. Defendant's plant manager, Tim Kempa, testified that, "I believe [Rodney] attended one shift meeting in the almost five years that I worked here," which was in 2002. Further, defendant submitted a "Michigan Operator Shift Meeting Summary for May/June 2002" that indicates that Rodney attended a shift meeting. Thus, reasonable minds could not find that Rodney's alleged statement was made within the limitations period.

Distilled to its essence, plaintiff's hostile employment claim is based upon two incidents that raise racial overtones. Each incident is addressed separately.

A.

Plaintiff claims "the day that [he] was informed that he did not receive the [warehouse supervisor] position he stood outside the office door and heard Mr. Gildon tell the managers he would not take orders from a black man." However, it is clear from the record evidence that plaintiff did not hear this comment. Rather, another person, Rick Kinsey, conveyed to plaintiff that this comment was made. Plaintiff failed to provide evidence from Kinsey that the statement was made. We conclude that plaintiff's account of what Kinsey said is inadmissible hearsay.

MRE 801. Because this alleged statement is inadmissible hearsay, it cannot be considered and plaintiff has not shown a genuine dispute in this regard. MCR 2.116(G)(6).

B.

Plaintiff also claims that on February 21, 2004, Leigh Rodney caused a dog to attack plaintiff. Plaintiff admits that the dog did not touch him. However, Rodney allegedly told the dog to “sic” plaintiff. Surprisingly, Rodney admits that during this incident he stated, “I train my dog to bite black men.” However, Rodney claims he did so in jest. In regard to this comment, Rodney testified that:

Well, I -- I have -- if this is a racist remark, I'll stand by it in court. I have been observant that some black people more so than white people are more afraid of dogs. It's -- I have a home in the Bahamas, and it's stated—it's discussed as fact there . . . ”

The ignorant mindset of Rodney disclosed through his deposition testimony and the thoughtless and grossly inappropriate comment made by Rodney at the time of the incident cannot morally be defended. Nonetheless, as a matter of law, neither Rodney's mindset nor the content of his comment turn plaintiff's place of employment into a hostile work place. “[W]hether a hostile work environment existed shall be determined by whether a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as *substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment*. MCL 37.2103(h).” *Radtke v Everett*, 442 Mich 368, 394; 501 NW2d 155 (1993) (emphasis added). “[A] single incident of sexual harassment is generally insufficient to constitute a hostile work environment.” *Radtke*, supra at 372. However, “a single incident may be sufficient if *severe harassment is perpetrated* by an employer in a closely knit working environment.” (Emphasis added.) *Id.*

I conclude that plaintiff has not established a hostile work environment. Rodney has consistently maintained his comment was intended as a joke. Indeed, plaintiff testified that he believed that Rodney “thought it was funny.” Although not funny at all, the fact that Rodney thought it a joke supports the conclusion it was not his purpose to create an intimidating, hostile or offensive employment environment.

This ill-advised attempt at humor was grossly inappropriate and in extremely poor taste. Still, Rodney's bad judgment does not transform this single isolated comment into a workplace where severe harassment prevails. Though plaintiff complained to management that he was offended by the incident, he went to work every day following the incident. And while plaintiff was rightfully personally offended by the comment, there is no indication that plaintiff's entire employment environment became intimidating, hostile, or offensive. Further, Rodney apologized after learning his statement offended plaintiff. Rodney also attempted to discuss the incident, but plaintiff refused to meet him. Because plaintiff continued to go to work, no reasonable person could perceive that the incident substantially interfered with his employment.

In my opinion, the incident cannot reasonably be considered severe harassment necessary to establish an intimidating, hostile, or offensive employment environment. *Radtke, supra*.<sup>1</sup>

## II Failure to Promote

Plaintiff's next claim involves, "[w]hether the appellant set forth facts to demonstrate that the Appellee refused to promote him to the position of Warehouse Manager because of race?"

To establish a prima facie case of failure to promote based on race or gender, a plaintiff must present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Hazel v Ford Motor Co*, 464 Mich 456, 628 NW2d 515 (2001). Once the plaintiff presents a prima facie case of discrimination, the burden shifts to the defendant to articulate a non-discriminatory reason for the adverse employment action. *Hazle, supra* at 463-464. To prevail, the employee must then present evidence that the employer's explanation was a pretext for discrimination. *Id.* at 465-466.

Plaintiff correctly points out that the record does not establish that a warehouse supervisor must have a CDL license. However, possession of a CDL license nonetheless constitutes a non-discriminatory reason for defendant to hire Gildon instead of plaintiff. Further, plaintiff has not provided any evidence that defendant's explanation was a pretext for discrimination. Although plaintiff claims that the previous warehouse supervisor, Larry Bieber, "did not have a CDL *when he became* the warehouse supervisor," (Emphasis added) plaintiff fails to mention that Bieber later obtained a CDL license. Thus, there is no evidence that defendant's explanation for not promoting plaintiff was a pretext for discrimination.

Moreover, defendant also asserted, and provided a good deal of supporting evidence, that plaintiff was not promoted because he was a less than exemplary employee. Defendant's motion for summary disposition chronicles plaintiff's performance problems over his tenure, and includes several instances of destruction of company property and numerous shipping errors that cost defendant and its clients substantial time and money. In addition, defendant elicited

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<sup>1</sup> Plaintiff argues that time-barred acts supporting a hostile work environment are admissible as "background evidence," or "to illuminate current practices which, viewed in isolation, may not indicate discriminatory motives." *Seldon-Whittaker v HCR Manor Care*, \_\_\_ F Supp 4 \_\_\_, (ED Mich 2006), slip op at p 8 quoting *Cortes v Maxus Exploration Co*, 977 F2d 195, 200 (5 Cir 1992). However, because plaintiff failed to establish a claim for hostile work environment within the limitations period, background evidence cannot support a claim for hostile work environment. Thus, the question whether time-barred acts supporting a hostile work environment claim are admissible as background evidence need not be addressed in this case.

evidence that plaintiff borrowed defendant's vehicles failing to mention that he had no driver's license. In my opinion, the trial court properly granted plaintiff summary disposition in this regard. I would affirm the judgment of the circuit court.

/s/ Brian K. Zahra